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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-983

JOEL ANTHONY LILES and
RALPH ALEXANDER BREMNER,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

Petitioners' statement is accepted.

JURISDICTION

Petitioners' statement is accepted.

QUESTIONS PRESENTED

1. Whether Oregon's obscenity statute combined with its definitions is too broad and inspecific and so is in violation of the First Amendment.

2. Whether a portion of the decision of the Oregon

Court of Appeals turned upon a valid state procedural ground, and thus is not subject to review in this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners' statement is accepted.

OREGON STATUTORY PROVISIONS INVOLVED

Petitioners' statement is accepted.

OREGON RULES OF PROCEDURE INVOLVED

Petitioners' statement is accepted.

STATEMENT OF THE CASE

Petitioners' statement is accepted.

REASONS FOR DENYING THE WRIT

Petitioners seek the issuance of a writ of certiorari based upon an alleged error of constitutional dimensions in the trial judge's denial of their motion in arrest of judgment. ORS 136.500 and ORS 135.630 provide for the remedy of arrest of judgment and designate the *exclusive* grounds for the remedy:

ORS 136.500 provides:

> "A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty. It may be founded on either or both of the grounds specified in subsections (1) and (4) of ORS 135.360, *and not otherwise*. . . ." (Emphasis supplied).

ORS 135.630 provides:

> "The defendant may demur to the accusatory in-

strument when it appears upon the face thereof:

> "(1) If the accusatory instrument is an indictment, that the grand jury by which it was found had no legal authority to inquire into the crime charged because the same is not triable within the county;
>
> ". . . .
>
> "(4) That the facts stated do not constitute an offense; . . . ."

Petitioners based their motion in arrest of judgment on ORS 135.630(4), claiming that the facts stated in the indictment do not constitute an offense. This argument is in turn based on the contention that ORS 167.060(10) and Oregon Laws 1973, ch 699, §4 are overbroad and in violation of the First Amendment.

This Court held in *Roth v. United States*, 354 US 476 (1957) that the states could prohibit obscenity because obscenity is not protected by the First Amendment to the United States Constitution. However, state obscenity statutes have been subject to attack on two grounds: First, because they are overbroad, prohibiting expression which is not obscenity but is still protected by the First Amendment; such overbroad statutes are invalid for prohibiting protected expression. Second, because they are too vague; vague statutes violate an alleged offender's due process rights under the Fourteenth Amendment to the United States Constitution since the offender is unable to ascertain what is unlawful under the statute, and because enforcement officials can be arbitrary in picking behavior for prosecution

under such a statute. Vague statutes are also invalid due to the "chilling effect" they have on the exercise of expression protected by the First Amendment.

To meet both defects of overbroadness and vagueness, this Court has established and refined a standard of what is obscene and can be prohibited by the states. In *Roth, supra,* this Court held that obscenity was not protected by the First Amendment because it was utterly without redeeming social value. The test to determine whether material was obscene (which meant both that it could, as a matter of constitutional law, be prohibited, and whether it was, as a question of fact, prohibited by the state statute) was

> ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." (Footnote omitted). *Roth v. United States, supra,* 354 US at 489.

After *Roth,* many courts used "utterly without redeeming social value" as a prerequisite for a finding of obscenity and in *Memoirs v. Massachusetts,* 383 US 413 (1966), three members of this Court held the standard of what is obscenity to be that

> ". . . it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 US at 418.

Many states enacted statutes adopting either the *Roth* or the *Roth-Memoirs* standard.

In *Miller v. California,* 413 US 15 (1972) this Court reassessed its previous decisions and decided that to prove material was "utterly without redeeming social value" placed too great a burden on the prosecution. *Miller, supra,* 413 US at 22. Five justices joined in reaffirming *Roth* and held the standard to be applied by the trier of fact to be

> ". . . (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . ." *Miller v. California, supra* 413 US at 24.

"Sexual conduct specifically defined" could be defined by statute or construed by the state courts.

> ". . . we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. n. 6 . . .
>
> "———————
>
> "n. 6 See, *e.g.,* Oregon Laws 1971, c. 743, Art. 29, §§255-262, (which includes ORS 167.060(10)) [citations omitted] as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be under-

stood as approving of them in all other respects nor as establishing their limits as the extent of state power.

"*We do not hold, as MR. JUSTICE BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate.* [citations omitted]." *Id.* (Emphasis supplied).

Since Oregon Laws 1973, ch 699 §4(2) adopts the *Miller* language for obscenity, there can be no question that the standards to be applied are constitutional. Petitioners, therefore, must base their argument of overbreadth on the one aspect of the *Miller* requisites that this Court did not set out verbatim, *viz,* the definition of sexual conduct which state law must include.

However, this Court *did* cite the Oregon definition with approval as an example of a valid formulation in the context of obscenity regulation per se, not obscenity regulation for minors only. With the implied approval of the statute in *Miller,* there should be no question of the constitutional adequacy of that definition.

Even if petitioners did not have the hurdle of this Court's express approval in *Miller,* their argument must fail before this Court's examples of what can be defined for regulation:

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain *examples* of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

"(a) Patently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

> "(b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals." *Id*, at 25. (Emphasis supplied).

These were intended as mere examples and were not meant to be exhaustive. *Hamling v. United States,* 418 US 87 (1974); *Jenkins v. Georgia,* 418 US 153 (1974). But as examples of "hard core pornography" they are directed at the same type of conduct as defined in ORS 167.060(10):

> " 'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic area or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals *in an act of apparent sexual stimulation or gratification.*" (Emphasis supplied).

To be criminal, a depiction of such conduct must be "patently offensive" under Oregon Laws 1973, ch 699, §4(2). Any touching of the buttocks or female breasts must be "in an act of apparent sexual stimulation or gratification," and as such would be a "sexual act." Therefore, under Oregon's statutory scheme, touching the buttocks or female breasts must be depicted as a patently offensive sexual act. The depiction of conduct that petitioners contend cannot be constitutionally regulated falls within the examples of hard core pornography given by this Court in *Miller* as examples of what *can* be regulated. The Court of Appeals so construed it.

Oregon's definition of "sexual conduct" is limited to

"hard core pornography" and is valid under *Miller*. Indeed, even the course of many states with statutes embodying the older *Roth* or *Roth-Memoirs* test has been for the state's supreme court to construe their statute to be limited by *Miller* and uphold the convictions thereunder. *See Pierce v. State,* 292 Ala 473, 296 S2d 218 (1974), *cert den* 419 US 1130 (1975); *Herman v. State,* 256 Ark 840, 512 SW2d 923 (1974); *cert den* 420 US 953 (1975); *Price v. Commonwealth,* 214 Va 490, 201 SE2d 798, *cert den* 419 US 902 (1974); *People v. Kaplan,* — Cal Rptr ——, — CA3d ——, *cert den,* 419 US 915 (1974); *Slaten v. Paris Adult Theatre I,* 231 Ga 312, 201 SE2d 456 (1973), *reh den Paris Adult Theatre I v. Slaten,* 419 US 887 (1974); *see also People v. Enskat,* 33 CA3d 900, 109 Cal Rptr 433 (1973); *State ex rel Keating v. Vixen,* 35 Ohio St 2d 215, 301 NE2d 880 (1973); *Marshall v. Ohio,* 419 US 1062 (1974); *State v. Watkins,* 262 SC 178, 203 SE2d 429 (1973), *app dis* 413 US 905 (1974); *State v. Bryant,* 285 NC 27, 203 SE2d 27 *cert den,* 419 US 974 (1974).

At least two states, Maryland and Washington, have upheld, under *Miller,* statutes that had no definition of obscenity at all: *Ebert v. Maryland Board of Censors,* 19 Md App 300 (1973), *cert den sub nom Ayre v. Maryland,* 419 US 1073 (1974); *State v. J-R Distributors, Inc.,* 82 Wash 2d 584, 512 P2d 1049 (1973), *cert den* 418 US 949 (1974).

Three state supreme courts have invalidated their state obscenity statutes under *Miller*. In *Stroud v. Indiana*, 257 Ind 201, 300 NE2d 100 (1973), the Indiana Supreme Court gave no discussion of their reason, and appear to have been under the impression that this Court had held their statute unconstitutional when it vacated and remanded for consideration in light of *Miller*. In *State v. Shreveport News Agency*, 287 S2d 464 (La 1973), the court held a *Roth*-type statute invalid under *Miller* and held it lacked the power to construe the statute to conform to *Miller*. Their reading of *Miller* was shown to be incorrect by *Hamling, supra*, decided after *Shreveport News Agency*. Likewise, in Florida, their supreme court refused to construe a *Roth*-type statute to adopt the *Miller* standards on the grounds that it would violate due process to do so after the conviction. *Pape v. State*, 281 S2d 600 (Dist Ct App Fla 1973). That case also was decided before *Hamling* and its position rejected by the United States Supreme Court in that case and in the state supreme courts listed above.

In sum, Oregon's statutory scheme, as written by the Oregon legislature, complies with the *Miller* standard and is limited to "hard core pornography."

Defendants also argue that even if the statute were constitutional, the standard applied by the trial judge in determining whether or not the movies were obscene was overbroad and unconstitutional. However, the grounds for an arrest of judgment are limited to lack of

authority of the grand jury and insufficiency of the indictment. ORS 136.500, 135.630, *State v. Foster,* 229 Or 293, 366 P2d 896 (1962).

When the Oregon Court of Appeals reviewed the denial of petitioners' motion in arrest of judgment, the only issue was whether the facts alleged in the indictment constitute a crime. The standard applied by the trial judge had nothing to do with the sufficiency of the indictment and could not make the denial of the motion in arrest of judgment an error since it is not grounds for an arrest of judgment.

The propriety of the standard applied by the trial judge is not an issue for review as an error in itself, for without an assignment of error, there is no issue for review. Supreme Court Rules of Procedure, Rules 6.18 and 6.55; *State v. Roach,* 99 Adv Sh 1953, — Or App ——, 526 P2d 1402 (1974).

Nor is the propriety of the trial judge's standard a subject for review by the United States Supreme Court. This Court has traditionally recognized the procedural rules of the various states with respect to the preservation of a question for review by an appellate court. If the supreme court of the state determines that an issue was not properly assigned as error under state procedural rules, that issue is *not* open to review by this Court. *Hulbert v. Chicago,* 202 US 275 (1906); *Flournoy v. Weirer,* 321 US 253 (1944); *Sanford v. Aisa,* 228 US 705 (1913).

Even if the standard applied by the trial judge were before this Court, it does not constitute error, but is in conformity with the requirement established by *Miller* and subsequent cases.

At the sentencing of defendants Liles and Bremner, the trial judge made the following remarks:

> "In watching those movies, you will recall that I made some comments about the language of the statute, the depicting in a patently offensive manner, or whatever it says to that effect. And I thought it seemed to be kind of strange sort of language, when you say 'depicting by film.' A film is not an objectional matter.
>
> "But I thought probably the purpose of the entire statute was to say the depiction of sex which is—or sexual conduct which is—patently offensive and that is the intent, I believe, of the Legislature, regardless of the grammatical manner in which they have stated it. And proceeding from that premise then, you say, 'Well, what is patently offensive?'
>
> "And, frankly, I had to kind of apply my own standard, which I *believe, corresponds with the standards of the community*. And the standard probably, simply stated and boiled down, is the same one that was taught to me by my mother from the day I was a small child. If there was something of which I would not want her to know, then don't do it. Pretty simple.
>
> "Applying that standard, I would think that I wouldn't get any quarrel out of anyone in this room, that they wouldn't want their mother sitting next to them while they looked at either one of these movies. *They are patently offensive.*" (Tr 11-13). (Emphasis supplied).

From these remarks, it is seen that the trial judge found that the movies in question were patently offensive by the standards of the community. The use by the

trial judge of colloquialisms in applying community standards does not invalidate his application of these community standards under *Miller*.

> ". . . A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. [citations omitted] . . .
>
> ". . . .
>
> "The result of the Miller cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case. . . ." *Hamling v. United States, supra,* 418 US at 105-106.

That is just what the trial judge has done.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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